

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

ALLEN R. CALDWELL,

Plaintiff,

V.

SAINT LOUIS UNIVERSITY,
TENET HEALTHSYSTEM SL, INC.
d/b/a SAINT LOUIS UNIVERSITY
HOSPITAL, and
RICHARD BUCHOLZ, M.D.,

Defendants.

Case No.:

Circuit Court of the City of St. Louis

Cause No.: 1022-CC10505

MOTION TO DISMISS OF DEFENDANT RICHARD BUCHOLZ, M.D.

COMES NOW Defendant Richard Bucholz, M.D., and for his Motion to Dismiss pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure, states:

1. This is a civil action for medical negligence brought by Plaintiff Allen R. Caldwell against Defendant Richard Bucholz, M.D. and others, alleging a diagnosis of a brain tumor, allegedly resulting in unnecessary surgery, leading to Plaintiff incurring a “stroke.”
2. Among the specific allegations of negligence alleged against the Defendants, including Defendant Richard Bucholz, M.D., are claims that Defendants negligently diagnosed Plaintiff as having a brain tumor when none existed; negligently recommending Plaintiff undergo a surgical procedure to remove the brain tumor when it did not exist; and, in negligently failing to conduct adequate and proper tests, evaluations and studies to confirm the existence of a brain tumor. [See, Exhibit 1, Plaintiff’s Petition at p. 4, para. 14(a)-(c)].

3. The allegations of negligence relate to, at least in part, pre-operative care and treatment provided to Plaintiff Allen R. Caldwell by Defendant Richard Bucholz, M.D. during his evaluation and pre-operative discussions with Plaintiff Allen R. Caldwell.

4. Pre-operative evaluations, diagnoses and discussions had with Plaintiff by Defendant Richard Bucholz, M.D. were conducted at the John Cochran St. Louis Veterans Administration Medical Center.

5. Plaintiff Allen R. Caldwell at all times relevant to Plaintiff's cause of action was receiving care as a patient of the Veterans Administration.

6. Defendant Richard Bucholz, M.D., while providing care and treatment to Plaintiff Allen R. Caldwell, was an employee of the government as an employee of the Department of Veterans Affairs.

7. "Employee of the government," as used under U.S.C. §1346, includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States. 28 U.S.C. §2671. Actions against an employee, individually, of a federal agency are prohibited by 28 U.S.C. §2679(b).

8. The exclusive remedy of a Plaintiff against the United States for the conduct of a federal employee is provided by 28 U.S.C. §1346(b). An action against the employee, individually, is precluded under 28 U.S.C. §2679(b). Therefore, no claim or cause of action against Defendant Richard Bucholz, M.D. in his individual capacity exists.

9. Based upon the foregoing, Plaintiff's Petition filed in State Court fails to state a cause of action against Defendant Richard Bucholz, M.D. individually, upon which any relief may be granted against said Defendant.

10. Defendant Richard Bucholz, M.D. should be dismissed and, pursuant to 28 U.S.C. §2679(d)(1), upon certification of the United States Attorney that Richard Bucholz, M.D. was acting as an employee of the Department of Veterans Affairs, the United States of America should be substituted as a defendant in his stead.

WHEREFORE, Defendant Richard Bucholz, M.D. respectfully requests this Honorable Court accept jurisdiction over this action, dismiss Richard Bucholz, M.D. as a defendant, and following certification by a United States Attorney as to the employment of Richard Bucholz, M.D. by the Department of Veterans Affairs for the care and treatment to Plaintiff, substitute the United States of America as a Defendant.

Respectfully submitted,

/s/ Stephen G. Reuter

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**Attorneys for Defendants Saint Louis University
and Richard Bucholz, M.D.**

CERTIFICATE OF SERVICE

A true copy of the foregoing document was served via Electronic Mail and Regular U.S. Mail this 20th day of September, 2010, to:

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_____/s/ Stephen G. Reuter